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LOW CHENG TEIK & ORS v. LOW EAN NEE

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR PCA
NALLINI PATHMANATHAN FCJ
B [CIVIL APPEAL NO: 02(f)-30-04-2023(W)]
28 AUGUST 2024

Abstract – *The central distinction between the oppression action and the derivative action lies in the nature of the claim. What is the legal test to determine whether a shareholder's complaint is actionable by way of oppression action or a derivative action? Where the nature of the act, omission or misconduct is oppressive or unfairly prejudicial to a shareholder, and the resulting injury and loss may be classified as having been suffered directly and specially or separately and distinctly by the shareholder in such capacity, as opposed to loss or injury suffered by the company or all the other shareholders, then oppression is made out and the cause of action vests in the shareholder. In such an instance, s. 346 of the Companies Act 2016 provides the remedies available. If, however, the act, omission or misconduct is an injury done to the company, resulting in a loss to the company, then the cause of action vests in the company and s. 347 is the proper remedy to be utilised.*

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F ***COMPANY LAW:*** *Oppression – Acts and conducts amounting to oppression – Director assigned company's trademarks to company co-founded by him for nominal consideration without authorisation of Board of Directors – Shareholder filed oppression action against director – Whether shareholder's complaint actionable by way of oppression or derivative action – Whether claim should have not been brought by way of oppression action – Legal test to ascertain whether shareholder's complaint actionable under ss. 346 or 347 of Companies Act 2016*

G ***COMPANY LAW:*** *Derivative action – Wrongful assignment of trademarks – Director assigned company's trademarks to company co-founded by him for nominal consideration without authorisation of Board of Directors – Shareholder filed oppression action against director – Whether shareholder's complaint actionable by way of oppression or derivative action – Proper plaintiff to initiate action – Legal test to ascertain whether shareholder's complaint actionable under ss. 346 or 347 of Companies Act 2016 – What was wrong or infraction complained of – Whether wrongful act oppressive or unfairly discriminatory or otherwise prejudicial to shareholder/complainant alone or affected all shareholders – Whether cause of action vested in company or shareholder/complainant – Whether loss or damage suffered by company or shareholder/complainant alone – Whether loss suffered by all shareholders*

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The first to third appellants and the respondent were the shareholders and directors of the fourth appellant, SNE Marketing Sdn Bhd ('company'), with the first appellant also holding the position of the chairman of the company. The first appellant assigned the company's trademarks ('SNE's trademarks') to SNE Global Sdn Bhd ('SNE Global'), a company co-founded by the first appellant, for a nominal consideration of RM10. No resolution was passed by the Board of Directors of the company to authorise the said assignment. The respondent issued a statutory notice to seek leave to initiate a derivative action on behalf of the company, pursuant to s. 348(2) of the Companies Act 2016 ('Act'), against, *inter alia*, the first to third appellants, SNE Global and one Low Poh Ling who owned 50% of the shares in SNE Global and was one of its directors. The respondent, however, did not file a derivative action on behalf of the company but, instead, commenced an oppression action at the High Court against the appellants ('respondent's oppression action'). Separately, the company initiated an action at the High Court against, *inter alia*, SNE Global and Low Poh Ling and the parties entered into a consent order, following which the assignment of the SNE trademarks from the company to SNE Global was cancelled and the company was reinstated as the proprietor of the SNE trademarks. Meanwhile, the High Court rejected all eight complaints of oppression and dismissed the respondent's oppression action. On appeal, the Court of Appeal upheld the rejection of seven of eight of the grounds but reversed the High Court's decision on one complaint of oppression, concluding that the appellants had, by such assignment of the trademarks, acted so as to benefit themselves indirectly, *via* other corporate entities that were controlled by or related to them, to the prejudice of the respondent. The appellants were accordingly found liable for oppression. Hence, the present appeal. The question of law that arose for adjudication was, *inter alia*, what is the legal test to determine whether a shareholder's complaint is actionable by way of oppression action or a derivative action.

Held (allowing appeal)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The following criteria were proposed as the basis for the formulation of a legal test to ascertain whether a shareholder's complaint is actionable under s. 346 of the Act or more properly on behalf of the company under s. 347 of the Act: (i) what was the act or omission that one or more of the shareholders complained of – in short, identify the act, series of acts or omissions; (ii) can the act(s) or omission(s) be characterised as being, (a) oppressive to; (b) in disregard of the interests of; (c) unfairly discriminatory against; or (d) otherwise prejudicial to, one or more of the shareholders; (iii) does the cause of action vest in the shareholder or in the company; (iv) who suffered loss or damage from the wrong done – the shareholder in his capacity as a shareholder or the company; and (v) is the loss suffered by the shareholder, as the plaintiff, separate and distinct to the plaintiff in his capacity as a shareholder or is it a loss

A suffered by all the shareholders. Applying the elements of the legal test above, (i) the wrong or infraction complained of was the wrongful assignment to a third party of the SNE trademarks which belonged to the company; (ii) the wrongful act could not be said to be oppressive or unfairly discriminatory or otherwise prejudicial to the respondent alone
B in her capacity as a shareholder. Rather, it was a wrong that affected all the shareholders; (iii) the cause of action vested in the company and not the respondent; (iv) the loss or damage arising as a consequence of the wrongful assignment of the SNE trademarks to a third party was suffered by the company and not by the respondent alone in her capacity as a
C shareholder; and (v) the loss was suffered by all the shareholders and not by the respondent alone. (paras 93 & 130)

(2) The respondent was entitled to seek leave to commence a derivative action on behalf of the company against the wrongdoer(s), under s. 347 of the Act, as was initially intended by the respondent. This meant that
D the respondent's claim, in respect of the assignment of the SNE trademarks could not be properly pursued by way of an oppression action. The proper plaintiff in this case was the company. Any loss suffered by the respondent, as a result of the assignment of the SNE trademarks, would be a loss in either the capital value of her
E shareholding or a loss in the dividends distributable to her. This was reflective loss, in that, it reflected the loss sustained by the company to the extent of her shareholding in the company. It could not constitute a separate and distinct injury resulting in a loss to the respondent in her capacity as a shareholder. As all other shareholders suffered the same loss as a consequence of this wrongful act, it could not be said that the
F loss or injury suffered by the respondent was singular and distinct. As the wrongful act was found to be that of the first appellant, it could not also be said that the respondent had been unfairly prejudiced by the conduct of the majority shareholders. The rule against reflective loss bolstered the determination that the respondent ought not to bring an
G action in her capacity as a shareholder. The cause of action vested in the company and not the respondent. This claim should not have been brought by way of an oppression action under s. 346 of the Act. This was not to say that there was no wrongdoing, as indeed there was, but such wrongdoing was done to the company and should have been
H pursued under s. 347 of the Act as a derivative action. (paras 131-133)

(3) The Court of Appeal erred in reversing the finding of the High Court, by inferring that the second and third appellants were aware of and participated in the assignment of the SNE trademarks to SNE Global when there was no evidence that warranted such a conclusion. The
I specific finding of the High Court, which the Court of Appeal initially agreed with, was that the respondent, as well as the second and third

appellants, had all acquiesced to the use of the SNE trademarks by SNE Global *vide* the set of resolutions. This could only mean that the respondent, as well as the second and third appellants, were aware that SNE Global had been authorised to use the SNE trademarks. It was not tenable from the foregoing to then conclude that the second and third appellants were fully aware of the assignment of the SNE trademarks to SNE Global. Consent to use the SNE trademarks, by SNE Global *vide* the set of resolutions, which were also signed by the respondent, was not the same as an outright assignment of the SNE trademarks to a third party. Knowledge of the former did not equate to knowledge of the latter. There was also no other evidence to support such a conclusion. To this extent, the Court of Appeal erred in conflating the two distinct acts. In order to bring a personal action as a shareholder against the appellants, it would be incumbent on the respondent to establish not only that the first to third appellants colluded to strip the company of the SNE trademarks, but to also go on to show that they benefitted from the profits from the use of these dishonestly assigned SNE trademarks to the exclusion of the respondent. There was no such evidence in this case. Therefore, the current fact scenario established conclusively that the loss suffered in this case was that of the company and the correct recourse was a statutory derivative action to be brought by any shareholder seeking to assuage such loss in a representative capacity. (para 135)

Bahasa Melayu *Headnotes*

Perayu pertama hingga ketiga dan responden adalah pemegang saham dan pengarah perayu keempat, SNE Marketing Sdn Bhd ('syarikat'), dengan perayu pertama menyandang jawatan sebagai pengerusi syarikat. Perayu pertama telah menyerahhakkan tanda-tanda dagangan syarikat ('tanda-tanda dagangan SNE') pada SNE Global Sdn Bhd ('SNE Global'), satu syarikat yang diasas bersama oleh perayu-perayu, untuk balasan nominal sebanyak RM10. Tiada ketetapan diluluskan oleh Lembaga Pengarah syarikat untuk membenarkan penyerahhakkan tersebut. Responden mengeluarkan notis statutori, memohon kebenaran memulakan tindakan terbitan bagi pihak syarikat, bawah s. 348(2) Akta Syarikat 2016 ('Akta'), terhadap, antara lain, perayu pertama hingga ketiga, SNE Global dan seorang yang bernama Low Poh Ling yang memegang 50% saham dalam SNE Global serta bertindak sebagai salah seorang pengarahnya. Responden, walau bagaimanapun, tidak memfailkan tindakan terbitan bagi pihak syarikat tetapi, sebaliknya, memulakan satu tindakan penindasan, di Mahkamah Tinggi, terhadap perayu-perayu ('tindakan penindasan responden'). Syarikat, secara berasingan, memulakan tindakan di Mahkamah Tinggi terhadap, antara lain, SNE Global dan Low Poh Ling dan pihak-pihak memeterai satu perjanjian persetujuan dan ekoran itu, penyerahhakkan tanda-tanda dagangan SNE daripada syarikat pada SNE Global dibatalkan dan syarikat dikembalikan

sebagai pemilik tanda-tanda dagangan SNE. Pada masa sama, Mahkamah Tinggi menolak kesemua lapan aduan penindasan dan menolak tindakan penindasan responden. Berikutan rayuan, Mahkamah Rayuan mengesahkan penolakan tujuh daripada lapan asas tetapi mengakas keputusan Mahkamah Tinggi berkenaan aduan penindasan, dengan menyimpulkan bahawa perayu-perayu telah, melalui penyerahhakkan tanda-tanda dagangan tersebut, secara langsung memanfaatkan diri mereka, melalui lain-lain entiti korporat yang dikawal oleh atau berkaitan dengan mereka, sehingga memprejudiskan responden. Perayu-perayu didapati bersalah kerana penindasan. Maka timbul rayuan ini. Soalan undang-undang yang timbul untuk diputuskan adalah, antara lain, apakah ujian undang-undang untuk menentukan sama ada aduan pemegang saham boleh didakwa melalui tindakan penindasan atau tindakan terbitan.

Diputuskan (membenarkan rayuan)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Kriteria berikut dicadangkan sebagai asas untuk membentuk ujian undang-undang demi menentukan sama ada aduan seorang pemegang saham boleh didakwa bawah s. 346 Akta atau lebih sesuai bagi pihak syarikat bawah s. 347 Akta: (i) apakah tindakan atau perilaku yang satu atau lebih pemegang saham adukan – ringkasnya, kenal pasti tindakan, siri tindakan atau ketinggalan; (ii) bolehkah tindakan atau ketinggalan disifatkan sebagai, (a) menindas; (b) mengabaikan kepentingan; (c) mendiskriminasi secara tidak adil; atau (d) memprejudis, satu atau lebih pemegang saham; (iii) adakah kausa tindakan terletak hak pada pemegang saham atau syarikat; (iv) siapakah yang mengalami kerugian atau kerosakan susulan kesalahan yang dilakukan – pemegang saham dalam kapasitinya sebagai pemegang saham atau syarikat; dan (v) adakah kerugian yang dialami oleh pemegang saham, sebagai plaintif, asing dan berbeza buat plaintif dalam kapasitinya sebagai pemegang saham atau adakah kerugian ini dialami oleh kesemua pemegang saham. Mengguna pakai elemen-elemen dalam ujian undang-undang di atas, (i) kesalahan atau pelanggaran yang diadukan adalah penyerahhakkan secara salah tanda-tanda dagangan SNE, yang dimiliki oleh syarikat, pada pihak ketiga; (ii) tindakan salah ini tidak boleh dikatakan menindas atau mendiskriminasi secara tidak adil atau memprejudis responden seorang dalam kapasitinya sebagai pemegang saham. Sebaliknya, ini adalah kesalahan yang menjejaskan semua pemegang saham; (iii) kausa tindakan terletak hak pada syarikat dan bukan responden; (iv) kerugian atau kerosakan yang timbul akibat penyerahhakkan secara salah tanda-tanda dagangan SNE pada pihak ketiga dialami oleh syarikat dan bukan responden seorang dalam kapasitinya sebagai pemegang saham; dan (v) kerugian ini dialami oleh semua pemegang saham dan bukan responden seorang.

(2) Responden berhak memohon kebenaran untuk memulakan tindakan terbitan bagi pihak syarikat terhadap pelaku salah, bawah s. 347 Akta, seperti yang asalnya diniatkan olehnya. Ini bermaksud tindakan responden, berkenaan penyerahhakkan tanda-tanda dagangan SNE, tidak boleh dimulakan dengan teratur melalui tindakan penindasan. Plaintif yang sebetulnya dalam kes ini adalah syarikat. Apa-apa kerugian yang dialami oleh responden, akibat penyerahhakkan tanda-tanda dagangan SNE, akan menjadi kerugian sama ada dalam nilai kapital pegangan sahamnya atau kerugian dan dividen boleh-bahagi padanya. Ini adalah kerugian reflektif iaitu cerminan kerugian yang dialami oleh syarikat setakat pegangan sahamnya dalam syarikat. Ini tidak boleh membentuk kejejasan asing dan berbeza yang mengakibatkan kerugian pada responden dalam kapasitinya sebagai pemegang saham. Oleh kerana kesemua pemegang saham mengalami kerugian yang sama akibat tindakan salah ini, tidak boleh dikatakan bahawa kerugian atau kejejasan yang dialami oleh responden adalah secara perseorangan atau terasing. Oleh kerana tindakan salah didapati dilakukan oleh perayu pertama, tidak boleh dikatakan juga bahawa responden telah terprejudis secara tidak adil ekoran tindakan pemegang saham majoriti. Kaedah bertentangan kerugian reflektif memperkukuhkan lagi dapatan bahawa responden tidak sepatutnya memulakan tindakan dalam kapasitinya sebagai pemegang saham. Kausa tindakan terletak hak pada syarikat dan bukan responden. Tuntutan ini tidak sepatutnya dimulakan melalui tindakan penindasan bawah s. 346 Akta. Ini tidak bermaksud tiada salah laku, kerana sememangnya wujud salah laku, namun salah laku tersebut dilakukan pada syarikat dan sepatutnya dimulakan bawah s. 347 Akta sebagai tindakan terbitan.

(3) Mahkamah Rayuan terkhilaf dalam mengakas dapatan Mahkamah Tinggi, dengan membuat kesimpulan bahawa perayu kedua dan ketiga sedar dan mengambil bahagian dalam penyerahhakkan tanda-tanda dagangan SNE pada SNE Global sedangkan tiada keterangan yang mewajarkan kesimpulan sedemikian. Dapatan khusus oleh Mahkamah Tinggi, yang asalnya disetujui oleh Mahkamah Rayuan, bahawa responden dan perayu kedua dan ketiga telah menyetujui penggunaan tanda-tanda dagangan SNE oleh SNE Global melalui set ketetapan. Ini tidak lain bermaksud bahawa responden dan perayu kedua dan ketiga sedar bahawa SNE Global dibenarkan untuk mengguna tanda-tanda dagangan SNE. Berikutan itu, tidak boleh disimpulkan bahawa perayu kedua dan ketiga sedar sepenuhnya tentang penyerahhakkan tanda-tanda dagangan SNE pada SNE Global. Kebenaran menggunakan tanda-tanda dagangan SNE, oleh SNE Global melalui set ketetapan, yang juga ditandatangani oleh responden, tidak sama dengan penyerahhakkan langsung tanda-tanda dagangan SNE pada pihak ketiga. Pengetahuan tentang yang pertama tidak sama dengan pengetahuan tentang yang

kedua. Tiada juga lain-lain keterangan untuk menyokong kesimpulan ini. Setakat ini, Mahkamah Rayuan terkhilaf dalam menggabungkan dua tindakan berbeza. Dalam memulakan tindakan perseorangan sebagai seorang pemegang saham terhadap perayu-perayu, responden wajib membuktikan bahawa perayu pertama hingga ketiga bukan sahaja berpakat untuk melucutkan syarikat daripada tanda-tanda dagangan SNE, tetapi responden juga mesti menunjukkan mereka seterusnya menikmati manfaat daripada keuntungan menggunakan tanda-tanda dagangan SNE yang diserah hak secara tidak jujur, sehingga mengasingkan responden. Tiada keterangan sedemikian dalam kes ini. Oleh itu, senario fakta semasa membuktikan secara konklusif bahawa kerugian dalam kes ini dialami oleh syarikat dan jalan yang betul adalah melalui pemulaan tindakan terbitan statutori oleh mana-mana pemegang saham yang ingin mengurangkan kerugian tersebut dalam kapasiti perwakilan.

Case(s) referred to:

Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors [2021] 4 CLJ 721 FC ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Ho Yew Kong v. Sakae Holdings Ltd And Other Appeals And Other Matters [2018] SGCA 33 ***(refd)***

Jaguar Financial Corp v. Alternative Earth Resources Inc [2016] BCCA 193 ***(refd)***

Johnson v. Gore Wood & Co [2000] UKHL 65 ***(refd)***

Mohd Najib Hj Abd Razak & Anor v. Government Of Malaysia & Another Appeal [2023] 10 CLJ 329 FC ***(refd)***

Ng Kek Wee v. Sim City Technology Ltd [2014] SGCA 47 ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2) [1982] Ch 204 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] CLJU 170; [1978] 1 LNS 170 ***(refd)***

Rea v. Wildeboer [2015] ONCA 373 ***(refd)***

Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2018] 2 CLJ 129 FC ***(dist)***

Sevilleja v. Marex Financial Ltd [2020] UKSC 31 ***(refd)***

Suying Design Pte Ltd v. Ng Kian Huan Edmund & Other Appeals [2020] 2 SLR 221 ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 181A, 181B, 181C, 181D, 181E, 346(1)(a), (b), (2)(c), 347, 348(2), 349, 350

Interpretation Acts 1948 and 1967, s. 17A

Companies Act 1948 [UK], s. 210

Other source(s) referred to:

Dan W Puchniak, Harald Baum & Michael Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach,* (Cambridge University Press, 2012) pp. 7, 8, 10, 11

Loh Siew Cheang, *Corporate Powers Accountability*, LexisNexis, 3rd edn, 2018, pp. 9-384

Paul Davies, Sarah Worthington & Chris Hare, *Gower's Principles of Modern Company Law,* 11th edn, Sweet & Maxwell, 2021, paras 14-001

For the appellants - Lim Chee Wee, Arjan Pursumal, Vasdev G Bakshani & Raphael Kok Chi Ren; M/s Vasdev Bakshani & Assocs
For the respondent - Conrad Young Wye King, Alfred Lai Choong Wui & Cheng Xin Yan; M/s Alfred Lai & Partners

[Editor's note: For the Court of Appeal judgment, please see Low Ean Nee v. Low Cheng Teik & Ors [2023] 2 CLJ 19 (overruled); Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24NCC-536-10-2019 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] This is an appeal by Low Cheng Teik and two others ('the appellants') against the decision of the Court of Appeal, finding:

(i) oppression against Low Ean Nee ('the respondent'), a member with an equal shareholding in SNE Marketing Sdn Bhd ('the company'); and

(ii) granting the remedy of a buy out of the respondent's shares pursuant to s. 346 of the Companies Act 2016 ('the Act'). Out of eight grievances, one act was found to establish oppression, stemming from a single director's breach of fiduciary duties, relating to a diversion of assets of the company. This breach of duty by the director was remedied before and during the course of this action.

[2] In the High Court, the respondent, who was the plaintiff, brought eight separate grounds in support of her oppression action. The High Court rejected all eight complaints of oppression, dismissing the action. On appeal, the Court of Appeal upheld the rejection of seven out of eight of the grounds but reversed the High Court on one complaint of oppression.

[3] This ground of complaint, summarily put, concerned the assignment of a series of trademarks of the company to one SNE Global Sdn Bhd ('SNE Global'). The Court of Appeal concluded that the appellants had, by such assignment of the trademarks, acted so as to benefit themselves indirectly, *via* other corporate entities, that were controlled by or related to them, to the prejudice of the respondent who held a substantial shareholding in the company. The appellants were accordingly found to be liable for oppression.

[4] The primary issue that arose for consideration in this appeal was whether this particular grievance of the respondent was properly brought by way of an oppression action. This in turn warrants a consideration of whether the grievance featured:

(i) a personal wrong or injury against the respondent as a shareholder;

(ii) a corporate wrong or injury against the company; or

(iii) a case of an overlap between a personal wrong and a corporate wrong.

[5] The nature of the wrong resulting in damage to the shareholder or the company is dealt with by the Legislature *vide* different statutory provisions and accordingly different and distinct remedies. This appears in the form of s. 346 of the Act *vide* the oppression action, which addresses the shareholder's complaint of loss or damage suffered in the capacity of shareholder. Section 347 of the Act provides for the statutory derivative action, which addresses the loss or damage suffered by the company by reason of the wrongdoing of those in control of it, providing relief for the company itself.

[6] Is an oppression action the appropriate form of action to be utilised to provide redress where the fact situation features a corporate wrong? Is such an action the appropriate statutory provision to use when there is a wrong suffered by the company which overlaps with shareholder loss? These issues warrant consideration to provide guidance on when the appropriate statutory provisions should be utilised, and to ensure that litigants do not improperly initiate an oppression action when a statutory derivative action would provide the available and more appropriate remedy. This issue was not, with respect, considered by the Court of Appeal.

[7] In this appeal, the key issue for consideration is the legal basis on which to determine when an oppression action as opposed to a derivative action should be instituted.

Salient Background Facts

[8] The company is a multi-level marketing company that supplies food supplements, nutritional supplements and dietetic substances for medicinal use, bearing the trademark of SNE and its variants. The company is the registered proprietor of SNE trademarks No. 2013002164 in Class 5 and No. 2013002165 in Class 35 ('the SNE trademarks').

[9] The respondent is the majority shareholder in the company, holding 50% of the company's shares, whereas the first appellant holds 39.7%, the second appellant holds 10% and the third appellant holds 0.3% of the shares in the company, respectively. The appellants collectively hold 50% of the shares.

No.	Name of Shareholder	Party	Shareholding
1.	Low Ean Nee	The Respondent	50.0%
2.	Low Cheng Teik	The First Appellant	39.7%
3.	Low Hock Boon	The Second Appellant	10.0%
4.	Lau See Yoong	The Third Appellant	0.3%

[10] All the shareholders are directors of the company with the first appellant also holding the position of chairman of the company. A

[11] The first appellant is the father of the second appellant and the uncle of the respondent, making the second appellant and the respondent cousins. The third appellant, Lau See Yoong, has no familial relations with the other shareholders of the company. B

[12] The respondent acquired her shareholding when her father bought 200,000 shares in her name in the company at a nominal par value of RM1 per share (for a total of RM200,000) in 2003. Over the years, the respondent was further allotted bonus shares without any cash call or capital injection. At all times, the respondent's shareholding in the company has remained undiluted and constant at 50%. C

[13] Notwithstanding her position as a director of the company, the respondent has not participated nor played any role in the running of the company's business since 2003. At all times, the company was managed and operated by the first to third appellants. D

[14] Between 2003 and 2018, the total turnover of the company amounted to RM1,023,097,850.87, with the respondent receiving a total dividend payment of RM15,010,000 over that period.

[15] On 28 May 2018, the first appellant executed a deed of assignment ('the DoA') to assign the SNE trademarks to SNE Global for a nominal consideration of RM10. No resolution was passed by the Board of Directors of the company to authorise the assignment. E

[16] SNE Global is a company co-founded by the first appellant in 2016. One Low Poh Ling, who is the daughter of the first appellant and sister of the second appellant, presently owns 50% of the shares of SNE Global and is one of its directors. F

[17] On 12 March 2019, the respondent lodged a police report in respect of the DoA executed by the first appellant, her uncle. She alleged that the SNE trademarks were wrongfully transferred to SNE Global by the first appellant without her knowledge or Board approval. G

[18] On 13 May 2019, the respondent issued a statutory notice of her intention to seek leave to initiate a derivative action on behalf of the company pursuant to s. 348(2) of the Act against, amongst others, the first to third appellants, SNE Global and Low Poh Ling ('the statutory notice'). The first to third appellants were accused of committing fraud, breach of fiduciary and contractual duties and breach of trust, primarily in relation to the assignment of the SNE trademarks. H

[19] Notwithstanding the statutory notice, the respondent did not file a derivative action on behalf of the company. Instead, an oppression action was commenced by the respondent. I

[20] Separately, the company filed a writ action against, amongst others, SNE Global and Low Poh Ling, in the High Court seeking, amongst others, a declaration that the DoA is void and the company is the registered proprietor of the SNE trademarks. On 27 August 2020, the parties in that suit entered into a consent order, following which the assignment of the SNE trademarks from the company to SNE Global was cancelled and the company was reinstated as the proprietor of the SNE trademarks in the registry of trademarks.

The High Court

[21] On 14 October 2019, proceedings were initiated in the High Court pursuant to s. 346 of the Act, *ie*, by way of an oppression action, premised on the basis that the first to third appellants had conducted the affairs of the company in a manner oppressive to the respondent and had unfairly disregarded the respondent's interests as a shareholder of the company.

[22] The respondent (as the plaintiff) in the High Court suit advanced broadly eight grounds in support of her allegation of oppressive conduct on the part of the first to third appellants:

(i) failure to secure a reasonable price for the disposal, transfer or assignment of the company's assets, particularly the SNE trademarks;

(ii) failure to conduct the company's affairs pursuant to its articles of association, namely, by passing Board resolutions between 31 January 2008 and 12 October 2018 ('the set of resolutions') which, among others, granted consent for the use of the SNE trademarks by third parties, without the respondent's knowledge through forging her signatures on the set of resolutions;

(iii) setting up of competing businesses, particularly SNE Global;

(iv) improper use of the company's funds through the purchase of luxury cars;

(v) mismanagement of the company;

(vi) falsification of the company's accounts and/or inaccurate accounting;

(vii) failure to satisfactorily account for the company's assets; and

(viii) passing of Board resolutions to stifle the filing of a derivative action by the respondent against the first to third appellants.

[23] Arising from these allegations, the respondent sought an order for the first to third appellants to buy out her shares in the company at the price of RM27.02 per share as valued by Messrs RW William, a firm of chartered accountants appointed by the respondent.

[24] The oppression action was wholly heard in the High Court by way of affidavit evidence. On 13 July 2020, the High Court dismissed the originating summons, rejecting the respondent's allegations in their entirety. A

[25] As stated above, the respondent argued that the first to third appellants had breached the company's articles of association by passing the set of resolutions without her knowledge, that is, without circulating the same to her, and by forging her signatures on the same. The High Court, however, found that there was no credible and cogent evidence that the respondent's signatures on the set of resolutions were forged by the first to third appellants. Based on a visual examination of numerous examples of the respondent's signatures, the High Court drew an irresistible inference that the disputed signatures were truly the respondent's signatures despite slight discrepancies. Furthermore, the High Court found that there was no need for the first to third appellants to resort to forgery since their presence alone was sufficient to pass a Board resolution as provided under the company's articles of association. In the premises, the High Court concluded that the respondent had failed to prove, on a balance of probabilities, that her signatures on the set of resolutions were forged. B C D

[26] In view of its finding that the disputed signatures on the set of resolutions were, in fact, the respondent's signatures, the High Court held that her allegation regarding her lack of knowledge of the passing of the set of resolutions, due to the same not having been circulated to her, must accordingly fail. E

[27] The respondent also alleged that the first to third appellants had diverted the company's business to SNE Global by wrongfully allowing SNE Global to use the SNE trademarks and, in turn, benefitting from the same. This allegation was premised on a Board resolution dated 2 February 2016, which granted consent to SNE Global for the use of the SNE trademarks. The same formed part of the set of resolutions referred to above. F

[28] In light of its earlier finding that the disputed signatures on the set of resolutions were truly the respondent's signatures, the High Court held that the Board resolution allowing SNE Global to use the SNE trademarks was valid and the respondent, having signed the same, was estopped from disputing its validity. G

[29] In respect of the allegation that the first to third appellants had benefitted from the use of the SNE trademarks by SNE Global due to their close connection with the latter, the High Court observed that SNE Global made no revenue in the financial year of 2017 to 2018, which necessarily meant that SNE Global did not carry out any sales or trading activity in 2017. As such, the respondent's assertion that the first to third appellants had benefitted and profited from the sales activities of SNE Global following its H I

A use of the SNE trademarks in 2017 was found to be unsubstantiated. The High Court further noted that the mere close connection between the first to third appellants and the directors of SNE Global was not proof that the first to third appellants had personally benefitted from the use of the SNE trademarks by SNE Global.

B **[30]** More pertinently, the High Court found that the disposal of the SNE trademarks to SNE Global for the sum of RM10 *via* the DoA did not amount to oppression by the first to third appellants against the respondent for the following reasons:

C (i) the second and third appellants had no knowledge of the DoA since no resolution was passed by the Board of Directors of the company to authorise the assignment of the SNE trademarks to SNE Global or to authorise the first appellant to execute the DoA on behalf of the company;

D (ii) the company's affairs had not been carried out in a manner which was oppressive to the respondent, as the first appellant had executed the DoA without first obtaining a mandate from the company;

(iii) the second and third appellants did not exercise their powers as the company's directors in an oppressive manner against the respondent as
E the first appellant had unilaterally executed the DoA without the involvement and knowledge of the second and third appellants;

(iv) the assignment of the SNE trademarks was not unfairly discriminatory against the respondent as the sole victim because the first to third appellants were all equally affected by the said assignment in their
F capacity as shareholders of the company;

(v) this was because any diminution of dividends resulting from the disposal of the SNE trademarks will not only cause the respondent to suffer loss of dividends, but will also cause the first to third appellants as shareholders of the company to suffer the same loss; and
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(vi) the respondent's complaint which appeared to allege that she alone was affected, targeted or victimised as a result of the disposal of the SNE trademarks was unacceptable since there was no element of discrimination between the shareholders of the company.

H **[31]** Based on the above, the High Court found that there was no oppression by the second and third appellants against the respondent. Furthermore, the High Court held that while the act of the first appellant in executing the DoA without being duly authorised to do so by the company was clearly a misconduct, the same did not amount to oppression against the respondent
I under s. 346 of the Act due to the following grounds:

(i) the SNE trademarks were assets owned by the company;

(ii) if the SNE trademarks had been assigned away by the first appellant without authorisation from the company, the party aggrieved by the same would be the company;

(iii) therefore, the proper plaintiff to claim any loss resulting from the assignment of the SNE Trademarks was the company and not the respondent, who was not the registered proprietor of the SNE trademarks; and

(iv) if the respondent wished to act on behalf of the company to recover such loss, that ought to have been done by way of a statutory derivative action with leave of the court.

[32] The High Court similarly found all other allegations of oppressive conduct against the first to third appellants to be untenable.

[33] Ultimately, the High Court concluded that the respondent had failed to prove, on a balance of probabilities, that the actions and conduct of the first to third appellants as alleged by the respondent amounted to oppression pursuant to s. 346 of the Act.

The Court Of Appeal

[34] Dissatisfied with the decision of the High Court, the respondent appealed to the Court of Appeal. On 13 September 2022, the Court of Appeal unanimously allowed the appeal and made the following orders:

(i) the order of the High Court is set aside;

(ii) the first, second or third appellant shall purchase all of the respondent's shares in the company;

(iii) the valuation of the share price is to be determined by an independent auditor agreed upon by the respondent and the first, second or third appellant, or if no agreement is reached, by PwC, or in the event of conflict, by EY or KPMG, as at the date of filing of the originating summons on 14 October 2019 based on international standards of accounting and valuation concerning a similar business as a going concern ('the expert valuer valuation report');

(iv) the expert valuer valuation report shall be binding upon parties; and

(v) the purchase price as determined by the expert valuer shall be paid by the first, second and third appellants in proportion to their shareholdings in the company within six months from the date of receipt of the expert valuer valuation report.

[35] At the outset, it is pertinent to note the inconsistency in the orders granted by the Court of Appeal as set out above. Notwithstanding the initial order for all of the respondent's shares in the company to be purchased by

either one of the appellants, the Court of Appeal subsequently ordered the purchase price of the shares as determined by the expert valuer to be paid by all of the appellants in proportion to their shareholdings in the company. From a reading of the orders granted by the Court of Appeal, it is unclear whether it was intended for the respondent's shares in the company to be purchased by only one of the appellants or by all three of them together in accordance with their respective shareholdings.

[36] Turning to the merits of the judgment, the Court of Appeal's reversal of the High Court's decision turned on the single complaint of the wrongful assignment of the SNE trademarks to SNE Global. In this regard, the Court of Appeal held as follows:

> … we find that the actions of the 1st to 3rd [Appellants] were calculated to benefit them indirectly *via* other corporate entities controlled and/or related by them to the prejudice of the [Respondent] being a substantial 50% shareholder of [the Company]. The assignment of the [SNE Trademarks] at the consideration of RM10.00 is unquestionably dubious here. This smacks of non-compliance of norms of fair dealing and violation of conditions of fair play and hence oppressive. Consequently, we find the learned High Court judge has committed a misdirection by finding there was no oppression on the [Respondent] by the 1st to 3rd [Appellants]. In other words, there was failure to appreciate that majority of the directors failed to act in the best interest of the [Respondent] *vis-à-vis* [the Company]. The affairs of the company were conducted effectively to side-line and exclude the [Respondent's] interest as shareholder and director.

[37] In consequence of the above, the Court of Appeal found that the first to third appellants were liable for oppression against the respondent in respect of the assignment of the SNE trademarks.

[38] The Court of Appeal, however, rejected all the other allegations of oppressive conduct raised against the first to third appellants and affirmed the findings of the High Court in relation to the same. In particular, the Court of Appeal was satisfied with the High Court's finding that the respondent had failed to discharge her burden of proof on a balance of probabilities in respect of her allegation that her signatures on the set of resolutions were forged. It followed that the respondent had knowledge of the contents of the set of resolutions as she had attended the relevant Board meetings. More importantly, the set of resolutions were deemed to have been circulated to and received by the respondent due to her failure to prove that her signatures on the resolutions were forged. As such, it was found that there was no actionable oppression for breach of the company's articles of association.

[39] The Court of Appeal made the following observations in relation to the allegation of forgery of the respondent's signatures on the set of resolutions:

> … concerning the issue of contravention of articles 73 and 90 of [the Company's] articles of association particularly on the forgery of the [Respondent's] signature in the board of directors' resolutions classified as 1st Set of Resolutions that were made between 31st January 2008 and 12th October 2018, *we are satisfied with the findings of the learned High Court judge that the [Respondent] failed to discharge her burden of proof of forgery on the balance of probabilities. This is a finding of fact which ought not to be interfered on appeal.*
>
> … we are … constrained to conclude that the [Respondent] knew of the contents of the 1st Set of the Resolutions because she attended the board of directors meeting as found by the learned High Court judge. That notwithstanding and more pertinently, *we find that the 1st Set of Resolutions must be deem (sic) to have been circulated and received by the [Respondent] because she failed to prove that her signature thereon has been forged.* Consequently, there is no actionable oppression for breach of articles 73 and 90 of [the Company's] articles of association. (emphasis added)

[40] In a later part of the judgment, the Court of Appeal nonetheless appeared troubled by the passing of three Board resolutions that granted consent for the use of the SNE trademarks to SNE Global, one SNE High Tech Plantation Sdn Bhd and one SNE F&B Sdn Bhd, respectively. All three of these Board resolutions formed part of the set of resolutions referred to in the High Court judgment. In this regard, the Court of Appeal observed as follows:

> On the facts and circumstances here, *we find that the 1st to 3rd (Appellants) on 2nd February 2016 caused and passed (the Company's) board of directors' resolution to grant the consent to SNE Global Sdn Bhd to use the (SNE Trademarks) without a proper and reasonable explanation for it.* In consequence, SNE Global Sdn Bhd sold the same products as that marketed by (the Company) in 2017. This was followed by the 1st (Appellant) and his daughter Low Poh Ling executing a deed of assignment on 28th May 2018 to assign the (SNE Trademarks) from (the Company) to SNE Global Sdn Bhd at the mere consideration of RM10.00. The 2nd and 3rd (Appellants) were passive about it. Moreover, *the 1st to 3rd (Appellants) had since on 4th April 2012 and again on 12th October 2018 caused and passed (the Company's) board of directors' resolution to grant the consent to SNE High Tech Plantation Sdn Bhd and SNE F & B Sdn Bhd to use the (SNE Trademarks) respectively without proper and reasonable explanation for it too.* (emphasis added)

[41] With respect, it is distinctly clear that the findings of the Court of Appeal as set out above are contradictory. On the one hand, the Court of Appeal affirmed the High Court's findings that the respondent's signatures on the set of resolutions were not forged, which the Court of Appeal emphatically deemed "ought not to be interfered on appeal". This led to the finding that the set of resolutions was deemed to have been circulated to and received by the respondent and that she consequently must have had knowledge of the same. On the other hand, the Court of Appeal went on to

A impute wrongdoing on the first to third appellants for the passing of three Board resolutions forming part of the set of resolutions by finding that such resolutions were "caused and passed" by the first to third appellants "without proper and reasonable explanation". These findings are evidently irreconcilable.

B **[42]** Moreover, notwithstanding that the first appellant unilaterally executed the DoA to assign the SNE trademarks to SNE Global without being authorised to do so by any Board resolution, the Court of Appeal nonetheless imputed knowledge of the assignment upon the second and third appellants:

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> We are nonetheless mindful that, subsequent to the assignment of the (SNE Trademarks), the 2nd and 3rd (Appellants) claimed no knowledge of the assignment which was unilaterally made by the 1st (Appellant). According to the 1st (Appellant), the assignment of the (SNE Trademarks) was procured through undue influence on him by his daughter, Sham
>
> D Kwee Lian, and Yu Baoguo who are his assistant and old friend respectively. Subsequently, (the Company) took steps to regularise the action of the 1st (Appellant) in having assigned the (SNE Trademarks) *via* Kuala Lumpur High Court commercial suit no. WA-22IP-4-01-2020 to recover the (SNE Trademarks) from SNE Global Sdn Bhd ("Recovery action").
>
> E However, *we find that the explanation of the 1st to 3rd (Appellants) is an incredulous pretence. The motivation behind the institution of the Recovery action is, in our view, to bolster the (Appellants') defence of the (Respondent's) oppressive action that has already been instituted in 2019.* (emphasis added)

[43] However, such finding was reached by the Court of Appeal as a matter
F of inference unsupported by evidence. There is no evidentiary basis from the affidavits for the Court of Appeal to find that the second and third appellants had knowledge of or were involved in the assignment of the SNE trademarks in the absence of any Board resolution authorising the same.

G **[44]** More importantly, for the purposes of the instant appeal, the Court of Appeal did not address the finding of the High Court that the respondent ought to have pursued her complaint concerning the assignment of the SNE trademarks by way of a derivative action instead of an oppression action.

The Federal Court

H **[45]** Dissatisfied with the decision of the Court of Appeal, the appellants sought leave and obtained the same in respect of the following questions of law:

(i) what is the legal test to determine whether a shareholder's complaint is actionable by way of an oppression action or a derivative action?;

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(ii) whether the court's determination of the merits of the complaints of oppression under s. 346 of the Companies Act 2016 is to be assessed at the date of filing of the oppression action or at the date of hearing of the oppression action; and

(iii) whether the court in exercising its discretion to order the purchase of shares in the company under s. 346(2)(c) of the Companies Act 2016 ought to consider reasonableness of the asking price of the plaintiff-shareholder, financial capacity of the defendant shareholder(s), and proportionality of the value of the share purchase in relation to the gravity of the matters complained.

The Appellants' Submissions

[46] Learned counsel for the appellants emphasised the importance of delineating the parameters of an oppression action and a derivative action to avoid complaints being disguised as the former in order to circumvent the fundamental proper plaintiff rule in *Foss v. Harbottle* [1843] 2 Hare 461, which bars the recoverability of reflective loss. It was submitted that the dichotomy is critical to prevent a shareholder from commencing an oppression action as an abusive tactical manoeuvre to seek drastic remedies, such as a winding up or a share buyout, that would otherwise be unavailable in a derivative action.

[47] On the facts of the instant appeal, learned counsel for the appellants submitted that the respondent's sole live complaint regarding the assignment of the SNE trademarks is actionable by way of a derivative action rather than an oppression action. In support of this contention, learned counsel cited the judgments of the Singapore Court of Appeal in *Ho Yew Kong v. Sakae Holdings Ltd And Other Appeals And Other Matters* [2018] SGCA 33 ('*Sakae Holdings*') and *Suying Design Pte Ltd v. Ng Kian Huan Edmund And Other Appeals* [2020] 2 SLR 221 ('*Suying Design*').

[48] In *Sakae Holdings*, the Singapore Court of Appeal took the view that an oppression action should not be used to vindicate wrongs which are in substance wrongs committed against a company and which are thus corporate rather than personal in nature. This was to prevent the improper circumvention of the proper plaintiff rule in *Foss v. Harbottle* and the concomitant principle barring the recovery of reflective loss.

[49] In this context, the Singapore Court of Appeal laid down the following analytical framework to ascertain whether a claim pursued under an oppression action is an abuse of process that should instead have been pursued by way of a statutory derivative action:

(a) Injury

(i) What is the real injury that the plaintiff seeks to vindicate?

(ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(b) Remedy

(i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?

A (ii) Is it a remedy that can only be obtained under [the oppression provision]?

[50] The first stage of the analytical framework requires the plaintiff to identify the real injury which he has suffered and establish that the injury does amount to oppressive conduct against him in his capacity as a B shareholder. In this regard, the plaintiff needs to demonstrate an injury to him that is distinct from and not merely incidental to the injury which the company suffers. The second stage of the analytical framework examines the essential remedy which the plaintiff seeks and whether that remedy is in fact directed at the real injury which the plaintiff suffers as a shareholder.

C **[51]** In its subsequent decision of *Suying Design*, the Singapore Court of Appeal reiterated the importance of the reflective loss principle in distinguishing between an oppression action and a statutory derivative action. The court emphasised that a wrong committed against a company, such as a director's breach of his fiduciary duties, that causes loss to the D company is suffered by shareholders only as reflective loss. A fall in value of the shares held by a minority shareholder arising from misappropriation of corporate assets was noted by the court as an example of reflective loss.

[52] Applying the analytical framework set out in *Sakae Holdings* and the principles drawn from *Suying Design* to the factual matrix of the instant E appeal, learned counsel for the appellants sought to establish that the oppression action initiated by the respondent is fundamentally flawed on the basis that the singular act of the first appellant in assigning the SNE trademarks to SNE Global amounts to a misappropriation of the company's assets in breach of a director's fiduciary duties and is therefore a corporate F wrong that ought to be actionable by way of a derivative action instead.

The Respondent's Submissions

[53] On the other hand, learned counsel for the respondent submitted that there ought not be a bright-line test to determine whether a shareholder's G complaint is actionable by way of an oppression action or a derivative action. It was contended that the position should instead be explored on a case-by-case basis in the light of all the facts. In support of this contention, learned counsel argued that the decision of the Singapore Court of Appeal in *Sakae Holdings* itself had merely set out an analytical framework to guide the courts rather than a rigid legal test. H

[54] In any event, learned counsel for the respondent submitted that the respondent's complaint is more appropriately actionable by way of an oppression action, notwithstanding that the complaint can be said to contain features of both a personal wrong and a corporate wrong. It was argued that I this was so because the respondent is only seeking personal relief through her oppression action and has suffered an injury that is distinct from that of all the other shareholders.

[55] Learned counsel submitted that the assignment of the SNE trademarks was aimed at diverting the company's business to SNE Global and that such diversion of business affected her personally since the ultimate beneficiaries of the same were the first to third appellants.

[56] It was submitted that the second and third appellants are part of a "clan" led by the first appellant, whose interests no longer align with those of the respondent. In this regard, learned counsel submitted that the fact that the first and second appellants have familial links with SNE Global, with the third appellant being a "loyal follower" of the first appellant, effectively led to the operation of SNE Global as an alter ego of the company but without the presence of the respondent. It was argued that the setting up of SNE Global and the subsequent assignment of the SNE trademarks were calculated attempts by the first to third appellants to sideline the respondent's interests, leaving her in a non-operational and unprofitable company while the first to third appellants continued to profit from the operations of SNE Global.

[57] In the circumstances, learned counsel contended that the respondent's interests had been totally disregarded by the first to third appellants and that she had accordingly suffered a distinct injury. It was submitted that this was so since the disposal of the SNE trademarks was engineered by the first to third appellants in order to benefit themselves as the controlling directors of the company.

[58] Learned counsel further submitted that a derivative action will not redress the respondent's complaint because even if the action is successful, the damages would be paid back into a company that remains under the control of the first to third appellants who could prevent any benefits from flowing to the respondent, all while the respondent remains in an environment where mutual trust and confidence has broken down. As such, it was submitted that the respondent's complaint is more appropriately actionable by way of an oppression action so as to ensure that the matters complained of can be brought to an end or remedied fully.

Our Analysis

Question Of Law (i): What Is The Legal Test To Determine Whether A Shareholder's Complaint Is Actionable By Way Of An Oppression Action Or A Derivative Action?

The Historical Origins Of These Causes Of Action

[59] It is rational to commence our analysis with the historical development of the oppression and derivative actions. These causes of action find their roots in English company law, notably the case of *Foss v. Harbottle* (as referred to earlier). There are two aspects to the rule established in this case.

[60] The first is the proper plaintiff rule, which states that it is the company and not its individual shareholders that *prima facie* comprise the proper plaintiff in an action in relation to a wrong done to the company. This principle flows from the fundamental doctrine in company law that a company is a separate legal entity from its shareholders with its own rights to sue. As such, if harm is done to a company, it is up to the company, and not to its individual shareholders, to decide whether the company may seek redress in respect of the injury sustained in the company's own legal capacity.

[61] The second aspect is the majority rule principle. Where the alleged wrong may be ratified by a majority of the shareholders voting in a general meeting, which will be binding on the company, no individual shareholder is permitted to maintain an action in respect of that matter. This principle recognises that shareholders in a general meeting are the residual source of authority in a company and that this authority can simply be exercised by majority vote.

[62] As a consequence of the two principles in *Foss v. Harbottle*, the courts, both in the United Kingdom and in this jurisdiction, were traditionally deferential to majority rule and unwilling to interfere in the internal affairs of a company. Such a judicial approach of non-interference in corporate affairs, however, left minority shareholders with no redress in situations where those in control of the company themselves cause harm to the company and use their position to prevent the company from commencing any action against them. This problem was alleviated, to an extent, by the development of several exceptions to the rule in *Foss v. Harbottle*, particularly on the grounds that there was a fraud on the minority, which allowed a minority shareholder to bring an action on behalf of the company. Such proceedings were called derivative actions. However, the common law derivative action was limited in scope.

[63] Furthermore, the majority rule principle also resulted in minority shareholders having little recourse against majority shareholders who use their dominant power to subject the former to unfair treatment. In such situations, the sole remedy available to minority shareholders was the winding up of the company on just and equitable grounds. However, courts were traditionally reluctant to award this remedy as it was often considered unduly harsh and drastic. As a result, abuses of power by majority shareholders remained largely unchecked (see: *Margaret Chew, Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd edn, 2017) at para. 5.004).

[64] Recognising the need for broader minority shareholder protection, statutory redress was introduced in our jurisdiction in the form of the oppression remedy and the statutory derivative action. While both these provisions are aimed at affording protection to minority shareholders against the abuse of majority power, they remain distinct remedies with separate objectives and functions. Against this historical backdrop, we turn to consider the oppression remedy.

The Oppression Remedy

[65] The statutory remedy for oppression is directed against unfair conduct in the management of a company as a consequence of which a member or shareholder suffers injury in his capacity as such. The lineage of this provision can be traced back to s. 210 of the United Kingdom Companies Act 1948, aimed at strengthening the position of minority shareholders in private companies (see: *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] CLJU 170; [1978] 1 LNS 170; [1978] 2 MLJ 227 at 228).

[66] The rationale behind the introduction of the oppression provision was explained by the then Minister of Commerce and Industry, Dr Lim Swee Aun, during the second reading of the Companies Bill in the House of Representatives (Dewan Rakyat):[1]

> … in section 181 there are some new provisions designed to give an effective remedy to the minority of shareholders, who are being oppressed by the majority.

[67] The oppression remedy is presently governed by s. 346 of the Act. More particularly, s. 346(1) reads as follows:

> 346 Remedy in cases of an oppression
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> (1) **Any member** or debenture holder of a company may apply to the Court for an order under this section on the ground -
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in **a manner oppressive to one or more of the members** or debenture holders including himself **or in disregard of his or their interests as members,** shareholders or debenture holders of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which **unfairly discriminates against or is otherwise prejudicial to one or more of the members** or debenture holders, including himself. (emphasis added)

[68] It is clear from the express wording of s. 346(1) that relief under this provision is available to a member and the member sues for relief in their own right to protect their interests *qua* member. In other words, the minority shareholder sues for harm that they have suffered personally.

[69] More specifically, s. 346(1) envisages oppressive conduct as being established in four circumstances:

(i) limb (a) of s. 346(1) refers to the conduct of the affairs of the company or the exercise of the powers of the directors in a manner that is either oppressive "to one or more of the members" or in disregard of "his or their interests as members"; and

A (ii) limb (b) of s. 346(1) refers to an act of the company or a resolution of the members which either unfairly discriminates against or is otherwise prejudicial "to one or more of the members".

[70] The common element undergirding the four grounds for oppression as set out in s. 346(1) is that the act of oppression should be targeted directly
B and specifically against one or more of the minority shareholders, resulting in injury to them in their personal capacity. The minority shareholder should have suffered direct or immediate loss, detriment or injury as a consequence of the alleged oppressive act. Where no such harm is done, and no damage or prejudice is caused to the minority shareholder by reason of the conduct
C of the majority, an action under s. 346 ought not to lie.

[71] Furthermore, s. 346(1) expressly requires a minority shareholder to show a separate and distinct loss from that suffered by all the shareholders of the company. Both limbs (a) and (b) of s. 346(1) stipulate that the oppressive act needs to have been carried out against "one or more of the
D members". A plain reading of the words clearly indicates that the oppressive conduct ought to have been directed against a single shareholder or a specific class of shareholders. In other words, a minority shareholder needs to show that they have been singled out as a victim of unfair prejudice.

E **[72]** It follows that a wrong done to the company, which affects all the shareholders equally, falls outside the ambit of s. 346. Rather, the provision envisages oppressive conduct as being established where a minority shareholder has suffered a peculiar harm to the exclusion of the majority.

[73] This requirement for a minority shareholder to show that he has
F suffered harm that is separate and distinct from the harm suffered generally by all the shareholders in order to establish an oppression action is consistent with the approach adopted by Canadian cases (see: *Rea v. Wildeboer* [2015] ONCA 373 (a decision of the Ontario Court of Appeal); *Jaguar Financial Corp v. Alternative Earth Resources Inc* [2016] BCCA 193 (a decision of the British
G Columbia Court of Appeal)).

The Statutory Derivative Action

[74] The statutory derivative action was introduced through the Companies (Amendment) Act 2007 by inserting ss. 181A to 181E into the Companies Act 1965. It was emphasised by the then Parliamentary Secretary of the
H Domestic Trade and Consumer Affairs Ministry, Hoo Seong Chang, during the second and third readings of the Companies (Amendment) Bill 2007 in the House of Representatives (Dewan Rakyat) that the introduction of the statutory derivative action was intended to enable a complainant to bring an action on behalf of the company[2]:

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Fasal 22 bertujuan memasukkan seksyen 181A, 181B, 181C, 181D dan 181E ke dalam Akta 125 untuk membolehkan pengadu mengambil tindakan bagi pihak syarikat.

[75] Currently, the statutory derivative action is provided for under ss. 347 to 350 of the Act. The relevant provision for the purposes of the instant appeal is s. 347. It is reproduced below for ease of reference:

347 Derivative proceedings

(1) A complainant may, with the leave of the Court **initiate, intervene in or defend a proceeding on behalf of the company.**

(2) Proceedings brought under this section shall be **brought in the company's name.**

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated. (emphasis added)

[76] Under s. 347, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company. In essence, s. 347 allows a shareholder to commence an action for and on behalf of the company to remedy a wrong done to the company.

[77] The characteristic feature of the derivative action is that there is harm done to the company. Where the majority shareholders fail to rectify the harm inflicted on the company by filing an action for relief in the name of the company, the company's power to enforce its legal rights is delegated to its minority shareholders for the purpose of enforcing the company's rights through a derivative action. In other words, a minority shareholder's right to pursue a derivative action 'derives' from the right vested in the company (see: Dan W Puchniak, Harald Baum and Michael Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) at pp. 7 to 8).

[78] A derivative action is brought by a minority shareholder for the benefit of the company. Therefore, the outcome of the derivative action will not only affect the minority shareholder but will benefit all the shareholders of the company in the form of increased share value.

The Distinction Between Oppression And Derivative Action

[79] In summary, the central distinction between the oppression action and the derivative action lies in the nature of the claim. An oppression claim premised on the circumstances set out in s. 346(1) is a personal claim made by the minority shareholder who suffers a distinct and personal loss, while a derivative action is brought on behalf of the company by the shareholder in a representative capacity. Therefore, the question to be asked when deciding on which action to pursue is this: against whom has the alleged harm been caused? If the harm has caused injury to one or more shareholders, then the oppression action is proper. If the harm is to the company alone, a derivative action is the appropriate cause of action.

[80] This distinction is reinforced by s. 17A of the Interpretation Acts 1948 and 1967, which requires the court to construe a statutory provision against the context and purpose of the underlying statute. This is because the meaning of the words used in a particular provision and the intent of the Legislature in enacting the same can only be properly understood by construing the statute as a whole and giving effect to every other provision in the statute (see: *Mohd Najib Hj Abd Razak v. Government Of Malaysia & Another Appeal* [2023] 10 CLJ 329; [2023] 6 MLJ 483).

[81] It would not be tenable therefore to read s. 346 *in vacuo*. Instead, the oppression remedy must be construed harmoniously with the statutory derivative action provisions in order to give effect to the true purport and meaning of these provisions as envisioned by the Legislature.

[82] As stated earlier, the Companies Act 1965 did not originally contain the provisions allowing for a derivative action. These provisions were inserted in 2007 in addition to the existing oppression remedy. The Legislature must have had a reason for so doing. That reason becomes apparent when the derivative action provisions are interpreted holistically with s. 346.

[83] As pointed out earlier, the purpose of the oppression action (as outlined in the Hansard) is to enable a minority shareholder who is being oppressed by the majority to seek a remedy. This means that the oppressive conduct must result in a separate and distinct harm to the shareholder from the harm suffered by all the shareholders generally. Oppression cannot be established merely by showing that the company itself has suffered damage, with consequential damage to the shareholder. If that was the case, it would mean that a shareholder would always be able to mount an oppression action whenever a wrong has been committed against the company. This would, in effect, eviscerate the statutory derivative action provisions which were specifically enacted by the Legislature to allow a shareholder to bring an action for and on behalf of the company.

[84] In enacting separate provisions to govern the oppression action and the derivative action, respectively, the Legislature has signalled the need for a distinction between both actions. Accordingly, it is not open for the courts to ignore the statutory distinction between an oppression action, where the conduct of the majority shareholders or the persons in control of the company causes direct and immediate harm to a minority shareholder, versus a derivative action where claims arise solely because the company itself has suffered damage and there is only incidental loss to the minority shareholder.

[85] The existence of the two distinct statutory provisions warrants the conclusion that each section creates a different cause of action. It is self-evident that only the person in whom a cause of action is vested may enforce

the relevant claim. If the cause of action is vested in the company, then it is the company itself that should take action. If, on the other hand, it is vested in the shareholder, then he must take action (see: Paul Davies, Sarah Worthington and Chris Hare, *Gower's Principles of Modern Company Law* (11th edn, Sweet & Maxwell, 2021) at para. 14-001).

[86] It is therefore evident that the two types of actions relate to two different causes of action, which are to be employed or applied by the parties in whom such cause of action is vested in order to obtain the requisite remedies provided therein. The Legislature could not have intended for a cause of action vesting in the company to be dealt with by way of an oppression action under s. 346 or equally, for a cause of action vesting in a shareholder to be the subject matter of a statutory derivative action under s. 347.

[87] This strict delineation is necessary to prevent shareholders from bringing an oppression action for ancillary purposes, that is, in situations where there is no unfairly prejudicial conduct affecting their interests *qua* shareholder. The oppression remedy is not available where a minority shareholder simply wishes to leave and take their investment in the company with them or to sell their shares without a discount to reflect their minority shareholding (see: *Suying Design* at para. [36]). Nor can the remedy be used as a tool to take control of or break up the company.

[88] As stated by Loh Siew Cheang in *Corporate Powers Accountability* (LexisNexis, 3rd edn, 2018) at 9-384:

> In *Re a Company* [1983] BCLC 126, Lord Grantchester QC held that s. 75 of the Companies Act 1980 (UK) (the then UK equivalent of an oppression action under s. 346 of our Companies Act) was *not enacted to enable a 'locked-in' minority shareholder to require the company to buy him out.* This statement of general principle is unassailable and is reflected in later judgments, notably in the judgment of Lord Hoffmann in *O'Neill v. Phillips* [1999] UKHL 24; [1999] 1 WLR 1092 that *there is 'no exit at will' or a 'no fault' divorce,* or that *it is not the function of the Court to provide for an exit mechanism merely because an investment decision had turned sour without fault on the part of the alleged oppressors: Mega Education Systems Sdn Bhd & Anor v. Ozone Glass Design Sdn Bhd & Ors* [2011] 6 MLJ 644. (emphasis added)

[89] One danger of permitting a minority shareholder to pursue an oppression action where they have not suffered a separate and distinct loss from the loss to the company is that the shareholder may obtain relief from a cash-strapped wrongdoer at the expense of other shareholders or creditors. In *Ng Kek Wee v. Sim City Technology Ltd* [2014] SGCA 47, the Singapore Court of Appeal observed as follows:

> Where a wrong has been done to the company, the interests of other shareholders of the company as well as the company's creditors will have been similarly affected. The claimant shareholder should not be allowed to proceed by way of a personal action and recover at the expense of these

A other similarly affected parties. Related to this is the danger that defendant (*sic*) may face a multiplicity of suits from different claimants for essentially the same wrong done to the company. This is evidently problematic and economically inefficient.

[90] Another danger of allowing a shareholder to recover a loss which is B merely incidental to the company's loss through an oppression action rather than a statutory derivative action is that the latter has an inbuilt filter mechanism in the form of the leave requirement under s. 347 to sieve out unmeritorious claims, while the former has no such safeguard. If a distinction is not made between a genuine oppression claim and a derivative action, C minority shareholders may use s. 346 as a means to circumvent the rule in *Foss v. Harbottle* to bring frivolous claims that are not in the best interests of the company.

[91] Moreover, the remedies that can be obtained in an oppression action are much broader than those available in a statutory derivative action. The D dichotomy between both actions is therefore critical to prevent a shareholder from commencing an oppression action as an abusive tactical manoeuvre to seek drastic remedies, such as a share buyout or a winding up of the company, that would otherwise be unavailable in a derivative action.

The Formulation Of A Legal "Test"

E

[92] As stated earlier, the most compelling reason for formulating a legal "test" or guidelines in this context is that the governing legislation in this area contains two different statutory provisions, namely, ss. 346 and 347 of the Act. The nature of the wrong resulting in damage either to the shareholder or the company is dealt with by the Legislature *vide* different statutory F provisions and accordingly gives rise to different and distinct remedies.[3]

[93] Based on the matters considered above, the following criteria are proposed as the basis for the formulation of a legal test to ascertain whether a shareholder's complaint is actionable under s. 346 of the Act or more G properly on behalf of the company under s. 347 of the Act:

(i) what is the act or omission that one or more of the shareholders complain of?

In short, identify the act, series of acts or omissions;

H (ii) can the act(s) or omission(s) be characterised as being:

(a) oppressive to;

(b) in disregard of the interests of;

(c) unfairly discriminatory against; or

I

(d) otherwise prejudicial to one or more of the shareholders;

(iii) does the cause of action vest in the shareholder or in the company;

(iv) who has suffered loss or damage from the wrong done – the shareholder in his capacity as a shareholder, or the company;

(v) is the loss suffered by the shareholder as plaintiff separate and distinct to the plaintiff in his capacity as a shareholder, or is it a loss suffered by all the shareholders.

[94] It should be said that the formulation of the legal test provides criteria that may be applied to a given fact situation to determine the best cause of action to pursue under the Act, more particularly in relation to shareholder disputes. It does not comprise a blueprint that is set in stone, providing the complete and immutable touchstone for the cause of action an aggrieved party is bound to undertake. Instead, it provides relevant guidance to the court and litigants alike to consider the most appropriate form of action to take in a given situation.

[95] In summary, the legal "test" provides that where the nature of the act, omission or misconduct is oppressive or unfairly prejudicial to a shareholder, and the resulting injury and loss may be classified as having been suffered directly and specially or separately and distinctly by the shareholder in such capacity, as opposed to loss or injury suffered by the company or all the other shareholders, then oppression is made out and the cause of action vests in the shareholder. In such an instance, s. 346 provides the remedies available.

[96] If, however, the act, omission or misconduct is an injury done to the company, resulting in a loss to the company, then the cause of action vests in the company and s. 347 is the proper remedy to be utilised. This situation arises commonly where the injury causes loss to all shareholders alike such that it cannot be said that the loss is suffered distinctly, separately or uniquely by any single shareholder.

[97] Flowing from the above, a minority shareholder who seeks to bring an oppression action must first identify the conduct complained of on the part of the majority and establish that such conduct is unfairly prejudicial to their interests as a minority shareholder. It must then be shown that the majority's conduct has caused harm to the minority shareholder personally. Finally, the minority shareholder is required to demonstrate that they have been affected in a distinctive and individual manner which is distinct from the other shareholders by reason of the wrongful conduct, usually by the majority or those in control of the company.

[98] Where all the shareholders are affected equally by the wrongful conduct, it follows that the shareholder has not suffered distinct or special harm by reason of the wrongful conduct. In such an instance, the derivative action is most likely the proper cause of action.

A The Rule Against Reflective Loss Supports The Requirement For A Separate And Distinct Loss Suffered By The Shareholder Under Section 346

[99] While the distinction between an oppression action and a derivative action seems clear, it is often difficult to ascertain with any degree of certainty this seemingly simple difference. Often a wrong done to the B company may concurrently cause harm to its shareholders. For example, the misappropriation of the company's funds by a majority shareholder will not only harm the company but will also harm its shareholders in the form of a reduction in the value of their shares in the company. This type of loss cannot be recovered by the shareholder personally.

C **[100]** This is because company law has one more company-specific rule, namely, the rule on "reflective loss". It has been referred to as the "no reflective loss" principle. In instances such as the example above, the shareholder's loss simply "reflects" the company's loss.

D **[101]** As explained in *Gower's Principles of Modern Company Law*, the reason for this is that recovery by the company would also restore the shareholder's position. However, it is not simply a question of barring double recovery in the form of damages. The rationale is that the shareholder's rights will be met through recovery by the company. This rule naturally affects many potential E claims available to be brought by shareholders because those claims generally seek to recover "capital losses resulting from a drop in the value of shares or revenue losses resulting from the company having to reduce the dividends paid." (See: *Gower's Principles of Modern Company Law* at paras. 14-009).

F **[102]** As similarly described in *The Derivative Action in Asia: A Comparative and Functional Approach* at pp. 10 to 11:

> A derivative action must be distinguished from a direct action, in which the plaintiff shareholder files a suit in a personal capacity and the cause of action belongs to that shareholder. In such actions, the harm inflicted G primarily affects the shareholder's own rights, and the shareholder aims to redress that injury by claiming damages for him - or herself and not the company. *Usually, … directly recoverable damages do not include a reflective loss suffered by a drop in the value of the plaintiff shareholder's shares.*
>
> (emphasis added)

H **[103]** The origin of the rule against reflective loss can be traced back to the English Court of Appeal decision in *Prudential Assurance Co Ltd v. Newman Industries Ltd (No 2)* [1982] Ch 204 ('*Prudential*'), where it was held as follows:

> *But what [the shareholder] cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely* I *diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company …* The plaintiff's shares are merely a right of participation

> in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. (emphasis added)

[104] The principle against recovery by a shareholder for "reflective loss" was confirmed in the House of Lords decision in *Johnson v. Gore Wood & Co* [2000] UKHL 65; [2002] 2 AC 1 ('*Johnson*'). To reiterate, a shareholder cannot recover a loss that simply "reflects" the company's loss, namely, a reduction in the capital value of the shareholding or a diminution in the dividends he earns by reason of a loss suffered by the company in respect of which the company has its own cause of action.

[105] This principle was explained in *Johnson* by Lord Bingham in the following terms:

> Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.

[106] In so holding, there was adherence to the principle as defined in *Prudential* in limiting the "no reflective loss" principle to losses suffered by shareholders (not by other possible claimants), being losses suffered in relation to the value of their shares or dividends only. The rationale too was clear in that there was a requirement to:

(i) respect the concept of a company as a separate legal entity enjoying autonomy; and

(ii) protect the company's creditors by ensuring that only one party recovered for the loss and therefore preventing another party, *ie*, the shareholder, from recovering for the company's loss.

[107] In *Johnson*, however, a more expansive approach was put forward by Lord Millett, who enlarged the reflective loss principle by stipulating that the principle was further justified so as to avoid double recovery to the claimant at the expense of the defendant. An additional justification was the need to avoid prejudice to the company's creditors as a consequence of the depletion of its assets.

[108] By expanding the rule so, it was then relied upon to bar a wider variety of losses beyond that originally recognised in *Prudential*. Thus, shareholders who were creditors or employees also found that they could not bring claims

for losses suffered in their capacity as creditors or employees. This meant that a creditor or employee who was a shareholder was in a worse position than a shareholder who was not, giving rise to an anomalous situation.

[109] This expansion in the application of the "no reflective loss" principle was stopped in its tracks when the rationale for the rule was revisited recently in the United Kingdom Supreme Court decision in *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31; [2021] AC 39 ('*Marex*').

[110] Here, the argument that the reflective loss principle could be extended to unsecured creditors was unanimously rejected by the Supreme Court. The reasons varied, with the minority holding that the rule was not justifiable in terms of principle, while the majority opted for a narrow redrawing of the reflective loss principle, bringing it back to its origins as expounded in *Prudential*, namely, that capital loss in the form of the value of the shareholding and diminution in the dividends contravened the rule. Given this narrow definition, it followed that the rule did not "catch" claims made by the company's creditors because "[t]here is no correlation between the value of the company's assets or profits and the "value" of the creditor's debt, analogous to the relationship on which a shareholder bases his claim for a fall in share value".

[111] The leading judgment by Lord Reed concluded that the decision in *Prudential* established a rule of company law that a diminution in the value of shares or in dividends to the shareholders, which merely flows from a loss suffered by the company in consequence of a wrong done it by the defendants, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. However, Lord Reed rejected the avoidance of double recovery as the basis for the rule against reflective loss as this reasoning had been utilised erroneously to expand the rule to cover parties who have suffered loss otherwise than as shareholders, such as creditors. The rule, it was explained, is based on the rule in *Foss v. Harbottle,* which would be subverted if the shareholder could pursue a personal action where they have not suffered a distinct loss:

> The rule in *Prudential* … is distinct from the general principle of the law of damages that double recovery should be avoided. In particular, one consequence of the rule is that, where it applies, the shareholder's claim against the wrongdoer is excluded even if the company does not pursue its own right of action, and there is accordingly no risk of double recovery. That aspect of the rule is understandable on the basis of the reasoning in *Prudential*, since its rationale is that, where it applies, the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss. On that basis, a claim by the shareholder is barred by the principle of company law known as the rule in *Foss v. Harbottle* (1843) 2 Hare 461: a rule which (put shortly) states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself.

[112] In other words, the rule is inextricably tied up to the issue of who suffers the loss and thereby in whom the cause of action is vested, and ultimately reverts to the proper plaintiff rule.

[113] The judgment in *Marex* has the effect of reaffirming the narrow and bright-line rule of law that prevents a shareholder from claiming damages on the basis of a fall in the value of his or her shares or by reference to a reduction in dividends, where the company has a claim against the same defendant for the same wrongful action. There are, moreover, no exceptions whether or not the company pursues its own claim. Underlying this rule is the rationale that the shareholder does not suffer a loss that is distinct from that of the company. Permitting a shareholder to bring such a claim would contravene the rule in *Foss v. Harbottle*, namely, that only the company can bring a claim which belongs to it.

[114] The reflective loss principle was adopted and utilised by the Singapore Court of Appeal in *Sakae Holdings* in relation to oppression actions by reason of the fact that allowing a shareholder to recover under this principle would be merely reflective of the loss suffered by the company:

> *… it is clear that [the oppression action and the statutory derivative action] are ultimately intended to have distinct spheres of application. This stems from the need to prevent the improper circumvention of the proper plaintiff rule and the concomitant principle barring the recovery of reflective loss* … The proper plaintiff rule in *Foss v. Harbottle* (1843) 2 Hare 461 provides that in an action to seek redress for a wrong alleged to have been done to a company, the proper plaintiff is *prima facie* the company itself …; in other words, only the company can sue for the loss that it has suffered.
>
> *The reflective loss principle is a corollary to the proper plaintiff rule … Where the plaintiff shareholder's loss is merely a reflection of the loss suffered by the company which would be made good if the company were able to and did enforce its rights, the proper party to recover that loss is the company and not the shareholder …*
>
> For these reasons, we affirm and reiterate the view … that (the oppression action) should not be used to vindicate wrongs which are in substance wrongs committed against a company and which are thus corporate rather than personal in nature. (emphasis added)

[115] It follows from the foregoing that an oppression action requires a shareholder to suffer a harm or injury which is separate and distinct from that of the company. A diminution in the value of share capital or dividends is not a separate and distinct harm suffered by the shareholder as it is merely reflective of the company's loss. In other words, it is a loss suffered by all shareholders of the company and is not distinctive to the shareholder bringing the oppression action. To that extent, the reflective loss principle bolsters the requirement under s. 346 that the loss suffered by a shareholder must be special and distinctive to the shareholder.

[116] This position was reiterated by the Singapore Court of Appeal in its subsequent decision in *Suying Design*:

> *It is well-established that (the oppression action) should not be used to vindicate wrongs which are in substance wrongs committed against a company, and which are thus corporate rather than personal in nature. This is essential in preventing improper circumvention of the proper plaintiff rule in Foss v. Harbottle (1843) 2 Hare 461. The proper plaintiff rule provides that the proper plaintiff to seek redress for a wrong done to a company is prima facie the company itself. The corollary of this is the no reflective loss principle. Where the minority shareholder's loss is merely a reflection of the loss suffered by the company which would be made good if the company were able to and did enforce its rights, the proper party to recover that loss is the company and not the shareholder ...* The nature of the loss relied on is of vital importance since it would follow as a matter of logical argument that most corporate wrongs would have some ill - effects on the interests of the shareholders of the company and its creditors ... To elaborate, the damage that the wrongdoer inflicts on a company may affect its ability to pay dividends to its members or return their capital in winding up … and perhaps diminish the price at which members can sell their shares. Ordinarily, these ill-effects are put right when the company recovers what is due to it from the wrongdoer. *It is thus not sufficient to simply claim, for example, that the misappropriation of the company's assets has resulted in a decrease in the value of the shares held by a minority shareholder. Misappropriation of the company's assets is by its very nature unlawful and would reduce the assets of the company. Unless there is evidence to the contrary, the "injury" to the minority shareholder in that situation is merely a reflection of the loss to the company.*
>
> (emphasis added)

[117] In *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors* [2021] 4 CLJ 721; [2021] 3 MLJ 549, this court applied the rule against reflective loss in the context of assessing the losses claimed by a shareholder in an oppression action. It was held:

> The reflective loss principle dictates that a personal claim may only be brought by a member against the directors of a company where he can demonstrate: (1) a breach of duty owed to him personally; and (2) personal loss separate and distinct from that suffered by the company. Thus, no action lies at the suit of a member suing in that capacity to make good a diminution in the value of his shareholding, where it is merely a reflection of the loss suffered by the company …

[118] We acknowledge that the above authorities are at variance with the decision of this court in *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] 1 MLJ 141 ('*Rinota*'), where it was held that the reflective loss principle has "absolutely no application" in an oppression action. This case involved an oppression claim brought by a minority shareholder of a joint venture company against the company's majority shareholder. The oppression action was premised on, among others, the allegation that the majority shareholder was responsible for financial or accounting discrepancies, which meant that the audited annual accounts of the company as drawn up did not reflect the true value or the proper financial state of the company. The minority shareholder argued that this allegedly

oppressive act had caused losses to the company's financial position, as a result of which the minority shareholder had suffered a diminution in the value of its shareholding in the company.

[119] The Court of Appeal below, relying on the reflective loss principle, held that the minority shareholder was precluded from recovering its alleged loss as the same was merely a reflection of the company's loss. On appeal, however, this court reversed the decision of the Court of Appeal and held that the minority shareholder was entitled to recover its losses through an oppression action.

[120] In arriving at its decision, this court reasoned that the wrongful conduct in the case did not affect all the shareholders equally, but instead benefitted the majority shareholder and its affiliates at the expense of the minority shareholder (although the court did not go on to explain how this finding was reached). This is clearly distinguishable from the facts of the instant appeal, where all the shareholders of the company were equally affected by the alleged wrongful conduct, namely, the assignment of the SNE trademarks.

[121] More pertinently, this court in *Rinota* went on to observe that the reflective loss principle did not apply in the case as there was no claim by the company and thus no risk of double recovery by the minority shareholder, citing the reasoning of Lord Millett in *Johnson*.

[122] However, as we have pointed out earlier, the need to avoid double recovery was rejected as the basis for the rule against reflective loss by the majority of the United Kingdom Supreme Court in *Marex*, which held that a shareholder's claim is precluded by the rule even where there is no claim by the company and there is accordingly no risk of double recovery. This is because a loss suffered by a shareholder in the form of a diminution in the value of its shares or dividends is not recognised as being distinct from the loss sustained by the company and therefore does not give rise to an independent cause of action on the part of the shareholder.

[123] In light of the recent developments in the jurisprudence in the United Kingdom and Singapore as set out above, we conclude that the view expressed by this court in *Rinota* to the effect that the reflective loss principle has no application in an oppression action ought to be departed from.

[124] In this context, older cases which were determined under the statutory provisions of the Companies Act 1965, when the common law derivative action was also in use, ought to be read with circumspection.

[125] We reiterate that an oppression action can only be properly advanced where a minority shareholder has suffered a loss which is separate and distinct from the loss to the company, that is, to all the shareholders collectively.

[126] Following from this, the depletion of the company's assets due to a wrong done to the company does not amount to a personal injury to its shareholders. It is for the company to initiate an action to recover such loss. The shareholder is taken to have entrusted the management of the company's affairs to the majority shareholders. If the loss to the company is caused by those in control of the company themselves who refuse to take steps to recover such loss, the proper recourse is for the minority shareholder to seek leave from the court to bring a derivative action in order to enforce the company's rights.

[127] It is pertinent, however, that the reflective loss principle may not come into play where, for example, the loss in the value of the share capital or the loss of dividends is due to acts or omissions by the majority or by persons in control of the company where such loss is a result of oppression, unfair discrimination or otherwise prejudicial conduct against the shareholder himself to the exclusion of the other shareholders. In other words, the deprivation of dividends or losses is directed personally against the shareholder such that only he, and not the other shareholders, suffers such loss.

Application Of The Legal Test To The Present Appeal

[128] The wrongful conduct alleged by the respondent in the instant appeal is the assignment of the SNE trademarks to SNE Global *via* the DoA, which was unilaterally executed by the first appellant. The respondent claims that such conduct amounts to oppression by the appellants against her as a shareholder of the company.

[129] The SNE trademarks, however, are assets belonging to the company. The wrongful assignment of the SNE trademarks to a third party without the knowledge or approval of the company's Board of Directors results in harm or loss to the company by reason of such wrongful conduct.

[130] Applying the elements of the legal test as set out in para. 93 above:

(i) the wrong or infraction complained of is the wrongful assignment to a third party of the SNE trademarks which belong to the company;

(ii) the wrongful act cannot be said to be oppressive or unfairly discriminatory or otherwise prejudicial to the respondent alone in her capacity as a shareholder. Rather, it is a wrong that affects all the shareholders;

(iii) the cause of action vests in the company and not the respondent;

(iv) the loss or damage arising as a consequence of the wrongful assignment of the SNE trademarks to a third party is suffered by the company and not by the respondent alone in her capacity as a shareholder; and

(v) the loss is suffered by all the shareholders and not by the respondent alone.

[131] It follows that the respondent is entitled to seek leave to commence a derivative action on behalf of the company against the wrongdoer(s) under s. 347 as was initially intended by the respondent. This in turn means that the respondent's claim in respect of the assignment of the SNE trademarks cannot be properly pursued by way of an oppression action.

[132] The proper plaintiff in this case is the company. Any loss suffered by the respondent as a result of the assignment of the SNE trademarks would be a loss in either the capital value of her shareholding or a loss in the dividends distributable to her. This is reflective loss in that it reflects the loss sustained by the company to the extent of her shareholding in the company. It cannot constitute a separate and distinct injury resulting in a loss to the respondent in her capacity as a shareholder. As all other shareholders suffer the same loss as a consequence of this wrongful act, it cannot be said that the loss or injury suffered by the respondent is singular and distinct. As the wrongful act was found to be that of the first appellant, it cannot also be said that the respondent has been unfairly prejudiced by the conduct of the majority shareholders.

[133] The rule against reflective loss as set out earlier in the judgment therefore bolsters our determination that the respondent ought not to bring an action in her capacity as a shareholder. And this in turn is because the cause of action vests in the company and not the respondent. This claim should not have been brought by way of an oppression action under s. 346. This is not to say that there was no wrongdoing, as indeed there was, but such wrongdoing was done to the company and should have been pursued under s. 347 as a derivative action.

[134] This appears to have been a difficulty the respondent was alive to. As highlighted earlier, prior to the filing of the oppression action in this case, the respondent issued the statutory notice for leave to commence a derivative action on behalf of the company against, amongst others, the first to third appellants. Notably, the thrust of her complaints in the statutory notice largely revolves around the assignment of the SNE trademarks. As such, it is apparent that the respondent herself recognises that the remedy to her grievances lies in a derivative action. With respect, the wrong course of action was taken by the respondent in the present case through initiating an oppression action instead of proceeding to file an application under s. 347 to seek leave to initiate a derivative action on behalf of the company.

[135] In conclusion, we find that:

(i) as pointed out earlier, the Court of Appeal erred in reversing the finding of the High Court by inferring that the second and third appellants were aware of and participated in the assignment of the SNE trademarks to SNE Global when there is no evidence in the affidavits that warrants such a conclusion;

(ii) this is because the specific finding of the High Court, which the Court of Appeal initially agreed with, was that the respondent as well as the second and third appellants had all acquiesced to the use of the SNE trademarks by SNE Global *vide* the set of resolutions. This follows from the finding that the respondent's signatures on the set of resolutions were not forged. This in turn can only mean that the respondent as well as the second and third appellants were aware that SNE Global had been authorised to use the SNE trademarks;

(iii) it is not tenable from the foregoing to then conclude that the second and third appellants were fully aware of the assignment of the SNE trademarks to SNE Global. This is because consent to use of the SNE trademarks by SNE Global *vide* the set of resolutions (which were also signed by the respondent) is not the same as an outright assignment of the SNE trademarks to a third party. Knowledge of the former does not equate to knowledge of the latter. There is also no other evidence to support such a conclusion. To this extent, the Court of Appeal, with respect, erred in conflating the two distinct acts;

(iv) furthermore, the existence of a familial relationship between the first appellant and the second appellant, in itself, is insufficient to warrant such an inference;

(v) in any event, in all these instances, the net result is that assets of the company, namely, the SNE trademarks, have been stripped away by the first appellant and assigned to SNE Global. It is not an asset of the respondent that has been stolen or stripped away. Accordingly, the loss is that of the company and not the respondent *qua* shareholder;

(vi) in order to bring a personal action as a shareholder against the appellants, it would be incumbent on the respondent to establish not only that the first, second and third appellants colluded to strip the company of the SNE trademarks, but to also go on to show that they benefitted from the profits from the use of these dishonestly assigned SNE trademarks to the exclusion of the respondent. There is no such evidence in this case;

(vii) therefore, the current fact scenario establishes conclusively that the loss suffered in this case is that of the company and the correct recourse is a statutory derivative action to be brought by any shareholder seeking to assuage such loss in a representative capacity.

[136] In view of these matters, we are, with respect, unable to concur with the Court of Appeal in its ultimate finding that the respondent suffered oppression under s. 346 of the Act. We therefore allow the appeal.

The Questions Of Law

[137] We now turn to the questions of law before us:

(i) question i: What is the legal test to determine whether a shareholder's complaint is actionable by way of an oppression action or a derivative action?

Answer: The following criteria are proposed as the basis for the formulation of a legal test to ascertain whether a shareholder's complaint is actionable by way of an oppression action under s. 346 of the Act or a derivative action under s. 347 of the Act:

(a) what is the act or omission that one or more of the shareholders complain of?

In short, identify the act, series of acts or omissions;

(b) can the act(s) or omission(s) be characterised as being:

(1) oppressive to;

(2) in disregard of the interests of;

(3) unfairly discriminatory against; or

(4) otherwise prejudicial to one or more of the shareholders?

(c) does the cause of action vest in the shareholder or in the company?

(d) who has suffered loss or damage from the wrong done – the shareholder in his capacity as a shareholder, or the company?

(e) is the loss suffered by the shareholder as plaintiff separate and distinct to the plaintiff in his capacity as a shareholder, or is it a loss suffered by all the shareholders?

(ii) question ii: Whether the court's determination of the merits of the complaints of oppression under s. 346 of the Companies Act 2016 is to be assessed at the date of filing of the oppression action or at the date of hearing of the oppression action.

Answer: Since our answer to question (i) is sufficient to dispose the appeal, it is not necessary for us to answer this question.

(iii) question iii: Whether the court in exercising its discretion to order the purchase of shares in the company under s. 346(2)(c) of the Companies Act 2016 ought to consider reasonableness of the asking price of the plaintiff-shareholder, financial capacity of the defendant shareholder(s), and proportionality of the value of the share purchase in relation to the gravity of the matters complained.

Answer: Since our answer to question (i) is sufficient to dispose of the appeal, it is not necessary for us to answer this question.

[138] We order costs of RM80,000 to be paid by the respondent to the appellants subject to allocatur.

A **Endnotes:**

1. Parliamentary Debates of the House of Representatives, The Second Session of the Second Parliament of Malaysia (9 August 1965, Vol II, No. 8) at p. 1561.

B 2. Parliamentary Debates of the House of Representatives, The Fourth Session of the Eleventh Parliament of Malaysia (8 May 2007, No. 24) at p. 62.

3. There is also the third alternative of a wrong amounting to a statutory wrongdoing by a director or officer which provides for different forms
C of action to be taken against the wrongdoer under the Act.

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